TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 351

L. B. JACKSON, ET AL., PETITIONERS,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 12, 1943

CERTIORARI GRANTED OCTOBER 25, 1943

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 361

L. R. JACKSON, ET AL., PETITIONERS,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

	Original	Print
Record from the United States District Court for the Southern District of California, Central Division.		
Complaint for refund of estate tax paid	1	1
Exhibit A—Copy of claim for refund	6	5
Answer	15	11
Notice of motion for summary judgment and motion for summary judgment	19	13
Opposition to motion for summary judgment	22	14
Transcript of proceedings, November 20, 1961	25	17
Appearances	25	17
Colloquy between Court and counsel on motion for summary judgment	27	18
Order granting defendant's motion for summary judgment	43	27
Findings of fact, conclusions of law and summary judgment	45	28

RECORD PRESS, PRINTERS, NEW YORK, N. Y., DECEMBER 13, 1963

	Original	Print
Record from the United States District Court for the Southern District of California, Central Division—Continued		
Notice of appeal	49	30
Clerk's certificate (omitted in printing)	52	31
Proceedings in the United States Court of Appeals for the Ninth Circuit	53	32
Opinion, Jertberg, J.	53	32
Concurring opinion, Chambers, J.	59	39
Judgment	60	39
Clerk's certificate (omitted in printing)	61	40
Order allowing certiorari	62	40

[fol. 1] [File endorsement omitted]

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

Civil Action No. 964-57 TC

FRANCES S. PARKER (formerly Frances S. Richards), Executrix of the Will of George A. Richards, Deceased, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

COMPLAINT FOR REFUND OF ESTATE TAX PAID
—Filed August 8, 1957

Plaintiff alleges as follows:

1. The Court has jurisdiction of this action under Title 28, United States Code Section 1346.

2. Plaintiff is the duly appointed, qualified and acting Executrix of the Will of George A. Richards, Deceased.

3. Pursuant to petition duly filed and heard, the Superior Court of the State of California, in and for the County of Los Angeles, did on June 30, 1952, order, adjudge and decree that plaintiff as Executrix as aforesaid "be and is hereby authorized and directed to pay the sum of $3,000.00 a month from the corpus of said decedent's estate to Frances S. Richards, individually, for her support and maintenance, beginning May 27, 1951, and continuing until further order of this Court, but not exceeding a period of 24 [fol. 2] months."

4. During the period from June 30, 1952, to May 31, 1953, plaintiff, as Executrix, paid to herself individually, for her support and maintenance, pursuant to the aforesaid order, sums equivalent to $3,000.00 a month for a period of 24 months, or a total of $72,000.00.

5. The payment to plaintiff individually of said $72,000.00 was duly authorized under the laws of the State of California and was reasonably required and actually expended during the settlement of the estate for the support and maintenance of plaintiff in her individual capacity as a dependent of decedent. The entire said $72,000.00 was paid from the corpus of decedent's estate.

6. United States Estate Tax Return for said decedent was duly filed with the Collector of Internal Revenue at Los Angeles, California, on August 25, 1952, and the tax shown due thereby, namely, $669,011.26, paid to said Collector of Internal Revenue on said date.

7. Schedule M of said Estate Tax Return claims as a deduction from the measure of Federal estate tax due by reason of decedent's death the aforesaid $72,000.00 of support and maintenance payments made to plaintiff individually from the corpus of decedent's estate. Said amount is claimed as a deduction in said return under the provisions of Section 812(e) of the 1939 Internal Revenue Code as amended.

8. Upon audit and review of said Estate Tax Return defendant disallowed the said $72,000.00 claimed as a deduction as aforesaid and in addition made other adjustments in the measure of said estate tax liability which are not now in issue.

9. On or about January 11, 1954, plaintiff paid to the District Director of Internal Revenue at Los Angeles, California, additional estate tax in the amount of $129,338.63, [fol. 3] plus interest thereon, which resulted from the disallowance of the said $72,000.00 as a deduction and the other adjustments made upon audit and review.

10. On or about August 8, 1955, the plaintiff duly filed a timely claim for refund of $46,811.34 of the amount so paid, plus interest. A true and correct copy of said claim for refund, marked Exhibit "A", is attached hereto and made a part hereof.

11. In the prosecution of the said claim for refund and of this action for refund plaintiff has retained the law firm of Flint & MacKay and has incurred obligations on behalf

of the Estate of George A. Richards, Deceased, for costs and expenses incurred and for the payment of reasonable fees to her said attorneys for professional services rendered in connection with such attempted recovery of tax paid.

12. The amount of plaintiff's said obligation for costs, expenses and attorneys' fees is not now known and cannot be ascertained until the final determination and conclusion of these proceedings. Pursuant to applicable provisions of the Regulations of the Commissioner of Internal Revenue plaintiff asks that the court determine the amount of such costs, expenses and attorneys' fees which may be deducted in computing plaintiff's liability for Federal Estate Tax.

13. Pursuant to Notice of Adjustment, Form 1331, defendant on or about April 11, 1957, allowed plaintiff's said claim for refund to the extent of $6,441.18 of the amount claimed, plus interest of $1,778.24, or a total of $8,219.42, which said amount has been paid to plaintiff. Neither the support and maintenance payments of $72,000.00 nor any costs, expenses or attorneys' fees were allowed as deductions in determining the measure of estate tax due under said Notice or in computing the amount to be refunded thereunder.

[fol. 4] 14. On or about April 17, 1957, defendant sent to plaintiff, by registered mail, a statutory notice of disallowance under Internal Revenue Code Section 3772(a)(2), which disallowed plaintiff's claim for refund to the extent not previously allowed.

15. The addition to the estate tax liability of decedent's estate resulting from the disallowance of said $72,000.00 as a deduction from the measure of Federal estate tax is $29,520.00.

16. The reduction in the estate tax liability of decedent's estate which will result from the allowance as a further deduction of plaintiff's aforementioned costs, expenses and attorneys' fees is not now known.

17. Defendant acted illegally and erroneously in asserting, assessing and determining a deficiency in the estate tax properly payable by said estate and in demanding the

payment of said deficiency from plaintiff, plus interest, and in refusing to refund to plaintiff the amount so paid, plus interest thereon, for the following reasons:

(a) Plaintiff individually received and had the use of the said $72,000.00 as aforesaid, and all amounts received by plaintiff individually by reason of said decedent's death, including said $72,000.00, did not exceed in amount or value 50 per cent of decedent's "adjusted gross estate" as defined by I.R.C. Section 812(e) (1939 Internal Revenue Code as amended) and said $72,000.00 did in all other respects qualify as an allowable deduction in decedent's estate, pursuant to the requirements and provisions of said Section 812(e) and should be allowed as a deduction in computing Federal estate tax due by reason of decedent's death.

(b) Plaintiff's aforementioned costs, expenses and [fol. 5] attorneys' fees are properly allowable as an additional deduction in computing the measure of estate tax due by reason of decedent's death.

Wherefore, plaintiff prays judgment against defendant as follows:

1. For the sum of $29,520.00, together with interest thereon at the rate of 6% per annum from August 25, 1952, to date of refund to plaintiff of said sum.

2. Such additional amount by which the Federal Estate Tax due by reason of the said decedent's death is reduced by the additional deduction allowable for plaintiff's costs, expenses and attorneys' fees, incurred in the prosecution of the above-mentioned claim for refund and of this action, together with interest thereon from August 25, 1952, to date of refund to plaintiff thereof.

3. For costs of suit incurred herein.

4. For such other and further relief as may be proper in the premises.

Frances S. Parker (formerly Frances S. Richards), Executrix of the Will of George A. Richards, Deceased, Plaintiff.

Flint & MacKay, By Paul Burks, Attorneys for Plaintiff.

[fol. 6]

EXHIBIT A TO COMPLAINT

Form 843
U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
(Revised July 1953)

CLAIM

To Be Filed With the District Director Where Assessment Was Made or Tax Paid

---

DISTRICT DIRECTOR'S STAMP
(Date received)

The District Director will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form.

☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Name of taxpayer or purchaser of stamps
ESTATE OF GEORGE A. RICHARDS, DECEASED
TYPE OR PRINT Frances S. Parker
(formerly Frances S. Richards), Executrix.
Street address
c/o Flint & MacKay, 458 South Spring Street
City, postal zone number, and State
Los Angeles 13, California

1. District in which return (if any) was filed
Los Angeles, California

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from ....., 19...., to ....., 19....

3. Kind of tax Estate Tax

4. Amount of assessment, $.....;
dates of payment .....

5. Date stamps were purchased from the Government .....

6. Amount to be refunded
Interest as provided by law plus $46,811.34

7. Amount to be abated (not applicable to income, estate, or gift taxes) ..... $

The claimant believes that this claim should be allowed for the following reasons:

See statement attached hereto, which said statement is made a part hereof by reference as though set forth at length.

(Attach letter-size sheets if space is not sufficient)

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Signed FRANCES S. PARKER
Frances S. Parker,
formerly
Frances S. Richards, as
Executrix of the Will of
George A. Richards,
Deceased

Dated August 2, 1955

(See Instructions on Other Side)

[fol. 7]

ESTATE OF GEORGE A. RICHARDS, DECEASED—
STATEMENT RE CLAIM FOR REFUND OF FEDERAL ESTATE TAX

That claimant, Frances S. Parker, formerly Frances S. Richards, is now and continuously since June 19, 1951, has been the duly appointed, qualified and acting Executrix of the Will of George A. Richards, Deceased, who died at Detroit, Michigan, on May 27, 1951. That at the time of his death said decedent was a resident of the County of Los Angeles, State of California, and that the probate proceedings in decedent's estate are under the jurisdiction of the Superior Court of the State of California, in and for the County of Los Angeles, as matter No. 318,771.

That claimant makes the within claim in her capacity as Executrix of the said decedent's will and alleges:

I

That pursuant to petition duly filed and heard the said Superior Court of the State of California, in and for the County of Los Angeles, did on June 30, 1952, order, adjudge and decree that claimant as Executrix as aforesaid "be and is hereby authorized and directed to pay the sum of $3,000.00 a month from the corpus of said decedent's estate to Frances S. Richards, individually, for her support [fol. 8] and maintenance, beginning May 27, 1951, and continuing until further order of this Court, but not exceeding a period of 24 months."

That during the period from June 30, 1952, to May 31, 1953, claimant, as Executrix, paid to herself individually, for her support and maintenance, sums equivalent to $3,000.00 a month for a period of 24 months, or a total of $72,000.00. That the payment to claimant individually of said $72,000.00 was duly authorized under the laws of the State of California and was reasonably required and actually expended during the settlement of the estate for the support and maintenance of claimant in her individual capacity as a dependent of decedent. That the entire said $72,000.00 was paid from the corpus of decedent's estate.

That United States Estate Tax Return for said decedent was duly filed with the Collector of Internal Revenue at

Los Angeles, California, on August 25, 1952, and the tax shown due thereby, namely, $669,011.26, paid to said Collector of Internal Revenue on said date. That Schedule M of said return claims as a deduction from the measure of Federal estate tax due by reason of decedent's death [fol. 9] the aforesaid $72,000.00 of support and maintenance payments made to claimant individually by decedent's estate. That said amount is claimed as a deduction in said return under the provisions of Internal Revenue Code Section 812(e) of the 1939 Internal Revenue Code as amended.

That said Federal Estate Tax Return was reviewed subsequent to the time of filing by representatives of the Internal Revenue Service and the said $72,000.00 claimed as a deduction as aforesaid was disallowed. Claimant resisted the inclusion of said $72,000.00 in the measure of tax, but to stop the running of interest on the additional estate tax alleged to be due did, on or about January 11, 1954, pay to the District Director of Internal Revenue at Los Angeles, California, additional estate tax in the amount of $129,338.63, together with interest thereon as required by law. That the said $72,000.00 was included in the measure of said additional tax.

That claimant individually received and had the use of the said $72,000.00 as aforesaid and that all amounts received by claimant individually by reason of said dece- [fol. 10] dent's death, including said $72,000.00, did not exceed in amount or value 50 per cent of decedent's "adjusted gross estate" as defined by I.R.C. Section 812(e) (1939 I. R. Code as amended) and that said $72,000.00 did in all other respects qualify as an allowable deduction in decedent's estate, pursuant to the requirements and provisions of said Section 812(e), and should be allowed as a deduction in computing Federal estate tax due by reason of decedent's death.

II

That claimant, as Executrix as aforesaid, paid Federal and California income taxes upon income received by decedent during his lifetime, together with interest on said

taxes, which amounts have not been allowed as deductions in the measure of estate tax paid herein. That the detail of said payments is as follows:

That by "90-day letter" dated March 12, 1953, the Commissioner of Internal Revenue proposed a deficiency of $109,262.56 in decedent's 1949 Federal income tax liability, together with interest thereon as provided by law. Claim- [fol. 11] ant did thereafter duly file a petition with The Tax Court of the United States protesting said proposed deficiency, which said proceeding bore Docket No. 49171. On April 1, 1954, said Court, pursuant to stipulation of the parties, ordered and decided that there was an income tax deficiency for said year, 1949, in the amount of $14,005.02. Said liability was that of decedent and due from decedent's estate, and claimant did, on or about May 19, 1954, pay from funds of the estate to the District Director of Internal Revenue at Detroit, Michigan, the said $14,005.02, plus interest thereon in the amount of $3,468.06, or a total of $17,473.08, in satisfaction of said deficiency. The portion of said interest payment attributable to the period from the due date of decedent's 1949 U. S. income tax return, March 15, 1950, to the date of decedent's death, May 27, 1951, is $1,008.32.

The State of California also alleged a deficiency in decedent's 1949 California income tax liability, which said alleged deficiency was settled by the payment of additional tax of $1,088.07 and interest of $307.38, a total of $1,395.45, which was paid to the State of California on or about [fol. 12] December 23, 1954. The portion of said interest payment attributable to the period from the due date of decedent's 1949 California income tax return, April 15, 1950, to the date of decedent's death, May 27, 1951, is $72.88.

That by reason of the foregoing claimant alleges that the measure of estate tax due by reason of decedent's death should be reduced by the following amounts:

Additional 1949 U. S. income tax	$14,005.02
Interest to date of death	1,008.32
Additional 1949 California income tax	1,088.07
Interest to date of death	72.88
TOTAL	$16,174.29

III

That a liability in an undetermined amount exists against claimant, as Executrix as aforesaid, for Arizona income tax due on income received by decedent during his lifetime, together with interest thereon. Said liability has not been allowed as a deduction in the measure of decedent's [fol. 13] estate tax. That claimant believes that said Arizona income tax, together with interest thereon to the date of decedent's death, will not exceed the sum of $1,000.00.

IV

That in the prosecution of the within claim claimant has obligated decedent's estate for the payment of fees to her attorneys, Flint & MacKay, of Los Angeles, California, and that pursuant to the provisions of Reg. 105, Sec. 81.34, does hereby request that such fees be allowed as an additional estate tax deduction in the measure of estate tax in the event claimant does not elect to claim them for income tax purposes. That the amount of such fees is not now known, for the reason that they will be based in a large measure upon the amount of time required in the prosecution of this claim. Claimant has no contingent or partially contingent fee agreement with her attorneys.

WHEREFORE, claimant prays:

1. Refund of Federal estate tax paid by her as Executrix of the Will of George A. Richards, Deceased, on the following amounts:

[fol. 14] (a) $72,000.00 of support and maintenance payments, as hereinabove set forth in paragraph I.

(b) $16,174.29 Federal and California income tax and interest thereon, as hereinabove set forth in Paragraph II.

(c) Arizona income tax and interest thereon to be paid, estimated at $1,000.00, as hereinabove set forth in paragraph III.

2. Further refund of Federal estate tax paid for attorneys' fees incurred in the prosecution of the within claim.

3. For such other and further relief as may be proper in the premises.

[fol. 15] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 964-57 TC Civil

[Title omitted]

ANSWER—Filed October 8, 1957

The United States of America answers the complaint by admitting, denying, and averring as follows:

1. Admits the allegations contained in paragraph 1 of the complaint.

2. Admits the allegations contained in paragraph 2 of the complaint.

3. Denies, for lack of information sufficient to form a belief as to the truth thereof, the allegations contained in paragraph 3 of the complaint.

4. Denies, for lack of information sufficient to form a belief as to the truth thereof, the allegations contained in paragraph 4 of the complaint.

5. Denies, for lack of information sufficient to form a belief as to the truth thereof, the allegations contained in paragraph 5 of the complaint.

[fol. 16] 6. Admits the allegations contained in paragraph 6 of the complaint.

7. Admits the allegations contained in paragraph 7 of the complaint, but denies that plaintiff is entitled to a deduc-

tion for the sum of $72,000 under the provisions of Section 812(e) of the Internal Revenue Code of 1939.

8. Admits the allegations contained in paragraph 8 of the complaint.

9. Admits the allegations contained in paragraph 9 of the complaint, and avers that the interest paid by plaintiff to defendant consisted of a payment of $10,430.36 on December 18, 1953, and a further payment in the amount of $138.28 paid on May 14, 1954.

10. Admits the allegations contained in paragraph 10 of the complaint. With respect to said claim for refund, however, defendant denies all allegations of fact and conclusions of law contained in said claim, except to the extent expressly admitted herein.

11. Admits the allegations contained in paragraph 11 of the complaint.

12. Denies, for lack of information sufficient to form a belief as to the truth thereof, the allegations contained in paragraph 12 of the complaint.

13. Admits the allegations contained in paragraph 13 of the complaint, except denies the amounts set forth as refund of tax and interest, and avers that the notice of adjustment allowed plaintiff's claim for refund to the extent of $6,902.65 of the amount claimed, plus interest in the amount of $1,316.17, or a total of $8,218.82.

14. Admits the allegations contained in paragraph 14 of the complaint.

15. Defendant denies, for lack of information sufficient to form a belief as to the truth thereof at the present time, [fol. 17] the allegations contained in paragraph 15 of the complaint.

16. Admits the allegations contained in paragraph 16 of the complaint.

17. Defendant denies all allegations contained in paragraph 17, and its various subsections.

Wherefore, defendant demands judgment against the plaintiff and prays that it be awarded its costs in this action.

Laughlin E. Waters, United States Attorney, Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, John G. Messer, Assistant United States Attorney, Attorneys for Defendant.

[fol. 18] Affidavit of service by mail (omitted in printing).

[fol. 19] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 964-57-TC Civil

[Title omitted]

NOTICE OF MOTION FOR SUMMARY JUDGMENT AND MOTION FOR SUMMARY JUDGMENT—Filed November 8, 1961

To the Plaintiff, Frances S. Parker and Her Attorneys:

You, and Each of You, Will Please Take Notice that on Monday, the 20th day of November, 1961, at 10:00 A.M., or as soon thereafter as counsel can be heard, in Courtroom No. 3, before the Honorable Thurmond Clarke, in the United States Post Office and Court House Building, 312 North Spring Street, Los Angeles, California, the defendant, United States of America, by and through its attorneys herein mentioned, will make the following motion for summary judgment:

The defendant, United States of America, moves the Court to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment against the plaintiff and in favor of the defendant on the grounds that there is no issue of material fact remaining to be tried and that

[fol. 20] defendant is entitled to a judgment as a matter of law as appears from the pleadings and admissions on file, and the Memorandum submitted herewith.

Dated: November 8, 1961.

Francis C. Whelan, United States Attorney, Robert H. Wyshak, Assistant U. S. Attorney, Chief, Tax Division, Loyal E. Keir, Assistant U. S. Attorney, Attorneys for Defendant, United States of America.

[fol. 21] Certificate of service by mail (omitted in printing).

[fol. 22] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 964-57-TC Civil

[Title omitted]

OPPOSITION TO MOTION FOR SUMMARY JUDGMENT—
Filed November 13, 1961

To Defendant, United States of America, and to Its Attorneys:

Please Take Notice that at 10:00 A.M. on Monday, November 20, 1961, or as soon thereafter as counsel may be heard, plaintiff, Frances S. Parker (formerly Frances S. Richards) as Executrix of the Will of George A. Richards, Deceased, will, at the hearing on defendant's Motion for Summary Judgment, oppose said motion and move the Court to dismiss said motion upon the following grounds:

1. That under Rule 56 of the Federal Rules of Civil Procedure, summary judgment should be granted by the court only if there is "no genuine issue as to any material

fact and . . . the moving party is entitled to a judgment as a matter of law." That George A. Richards died May [fol. 23] 27, 1951. That paragraph 3 of plaintiff's complaint herein states:

> "3. Pursuant to petition duly filed and heard, the Superior Court of the State of California, in and for the County of Los Angeles, did on June 30, 1952, order, adjudge and decree that plaintiff as Executrix as aforesaid 'be and is hereby authorized and directed to pay the sum of $3,000.00 a month from the corpus of said decedent's estate to Frances S. Richards, individually, for her support and maintenance, beginning May 27, 1951, and continuing until further order of this Court, but not exceeding a period of 24 months.'"

Upon a trial of this matter plaintiff is prepared to prove that at the time said Order was made on June 30, 1952, decedent's widow was then entitled to receive 14 monthly payments of $3,000.00 each for her support and maintenance, or a total of $42,000.00. That under the rule of *Estate of Michael J. Rudnick*, 36 T, C. ——, No. 105, filed September 15, 1961, it would appear that plaintiff, as Executrix of the Will of George A. Richards, deceased, is entitled to a refund of federal estate tax measured by the said $42,000.00 right which accrued to her upon the making of the aforementioned June 30, 1952, Order. Under the rule of *In re Lux*, 114 Cal. 73, the widow's right to said $42,000.00 was not a terminable interest within the rule of *Estate of Edward A. Cunha*, 30 T. C. 812, 279 F.2d 292, cert. den. 364 U. S. 942.

2. That a total of $72,000.00 in family allowance payments were made from the Estate of Richards to the decedent's widow. That with reference to the $30,000.00 of such payments not included in the aforesaid $42,000.00, the right to which had accrued at the time the court's order was made, plaintiff would appear to be entitled, under Rev. Rul. 56-26, [fol. 24] 1956-1 C.B. 447, to show the portion of said $30,000.00 which went to decedent's widow under the provisions of decedent's will and establish a right to refund of estate tax paid on such portion of said remaining $30,000.00. That

the determination of the portion of said $30,000.00 which decedent's widow received under decedent's will is a material issue of fact which can be established only upon the presentation of proof by plaintiff.

3. That plaintiff is informed and believes, and upon such information and belief alleges that there are other material issues of fact which should be established on the trial of this matter which are relative to plaintiff's right to recover as prayed by her complaint.

In support of the foregoing, a Memorandum of Points and Authorities is attached hereto. Reference is also made to the pleadings and other documents on file in this action.

Dated this 13th day of November, 1961.

Flint & MacKay, Paul Burks, John C. Argue, By Paul Burks, Attorneys for Plaintiff.

[fol. 25]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 964-57-TC Civil

HONORABLE THURMOND CLARKE, JUDGE PRESIDING

FRANCES S. PARKER (formerly FRANCES S. RICHARDS), Executrix of the Will of GEORGE A. RICHARDS, Deceased, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS—November 20, 1961

Los Angeles, California.

APPEARANCES:

Attorneys for Plaintiff: Flint & MacKay, Paul Burks, John C. Argue, By: Paul Burks, 458 South Spring Street, Los Angeles 13, California, Telephone: MAdison 7-3114;

[fol. 26] Attorneys for Defendant: Francis C. Whelan, United States Attorney, Robert H. Wyshak, Assistant United States Attorney, Chief, Tax Division, Loyal E. Keir, Assistant United States Attorney, By: Loyal E. Keir, Assistant United States Attorney, 808 Federal Building, Los Angeles 12, California, Telephone: MAdison 5-7411, Extension 547.

[fol. 27] (The Court hears other matters.)

The Clerk: No. 10 on the calendar, Frances S. Parker vs. United States of America.

COLLOQUY BETWEEN COURT AND COUNSEL ON MOTION FOR SUMMARY JUDGMENT

Mr. Burks: Ready for the Plaintiff. I am Paul Burks.

The Court: Yes. Mr. Burks, we have had you down here for quite a while. How are we doing now? You still have your motion for summary judgment.

Mr. Burks: It is Mr. Keir's motion, not mine.

The Court: Yes, I know. It is before the Court.

Mr. Burks: I think there are two matters before the Court, the pre-trial and this motion for summary judgment.

The Court: Yes, that is right.

I will take it under submission. I will hear from you. Go right ahead.

Mr. Keir: If the Court please, this case or suit involves a suit for tax refund.

The Court: That is right.

Mr. Keir: It is a Federal Estate tax case and the only basic issue is a question of whether or not certain payments to the surviving spouse of the decedent, in the amount of $72,000, are proper tax deductions under Section 812(e) of the 1939 Internal Revenue Code. This case has been continued, your Honor.

[fol. 28] The Court: I know. We have been waiting for the Cunha decision.

Mr. Keir: Yes. It has been continued for a period of almost two years pending the outcome of the Cunha case and the Court of Appeals for this Circuit has finally spoken in the Cunha case and has held in that case that similar payments were not proper tax deductions. It based its decision on the California law as interpreted by the Supreme Court of California in the Blair case, which held that the surviving spouse's interest in such support payments constituted a terminable interest and therefore it was not deductible.

The taxpayer's application for certiorari to the Supreme Court of the United States was turned down earlier this year.

Since the Cunha case is now history, your Honor, and since the case here is indistinguishable, in our opinion, from Cunha, and since there is no real question of fact, and we concede that the $72,000 was paid, we feel that defendant's motion for summary judgment in this case should be granted under Rule 56.

The Court: I will hear from Mr. Burks.

Mr. Burks: I agree with Mr. Keir, your Honor, in what he has said, except for one thing. I think there are a number of technical reasons perhaps why this motion should be [fol. 29] denied; but, getting to the substance of it, there is a later case than the Cunha case, decided by the same Court that originally decided the Cunha case, namely, the Tax Court, in which that court recognizes the Cunha rule and says that as to amounts of family allowances which have become fixed, as to which the right has accrued, the Cunha rule doesn't apply. Now, that case is the Estate of Rudnick. It is a September 15, 1961 decision, and it is stated in the Opposition to the Government's Motion.

At the time the family allowance was granted in the Richards Estate, 14 $3,000.00 monthly family allowance payments had accrued. The decedent passed away in May of 1951, and the Superior Court's order was made in August of 1952.

Now, under the rule of the Estate of Lux, which is cited in memorandum of points and authorities attached to the Opposition to the Motion, I believe it is well established in California that where the family allowance payments were linked to a prior period, that that is a right which presently is vested in the widow or in the family, in this case the wic w; so that even if the widow were to pass away, her estate would receive the amount which had accrued up to the date of the order. In view of that, I think there is a very definite issue of fact here.

I don't think that a trial of this action should be required. [fol. 30] I think it should be possible for the Government and the Plaintiff to enter into a stipulation of all of the applicable facts and submit the matter on stipulation, a stipulated statement to the Court.

But I think that it would be a mistake for this court, in view of what I have said and for other reasons, too, that are mentioned in the Opposition to the Motion, to grant the Government's motion for a summary judgment.

Now, in the first place, this record is totally devoid of the facts. The Answer denies all of the material allegations of which I have spoken, and so Mr. Keir's motion today is essentially a demurrer; and in view of the Rudnick decision

and other decisions of the Tax Court and other Revenue rulings that are mentioned in the memorandum of points and authorities, it is the position of the plaintiff that Mr. Keir's motion is not well founded. Now, if the Court agrees with that, we are willing to continue the matter for any period that the Court would like to continue it, for the purpose of trying to work out a stipulation of facts with the United States Attorney's Office and submitting it to the Court on that stipulated statement.

The Court: I will see what he has to say.

Mr. Keir: May I answer counsel's contentions?

The Court: Yes, sir.

Mr. Keir: Your Honor, counsel's contention mainly is [fol. 31] that defendant's motion should be denied because of the decision of the Tax Court in the Rudnick case in 36 T.C. An analysis of that case indicates that the court did hold that the payments there did constitute a vested interest, that is, the payments to the surviving spouse, it did hold that they were a vested interest, not a terminable interest. But, your Honor, that case was based upon the proposition that under Massachusetts law, the local law of the State where the estate was probated, support payments pursuant to a court order had become final and constituted a vested interest. Now, that is extremely important, your Honor, namely, that the Tax Court did base its decision on what the local law held.

The local law of California, as interpreted by the Supreme Court of California in the Blair case, is that a surviving spouse's interest in support payments is a terminable interest. This is the law of California, which is very much different from the law of Massachusetts.

Therefore, we hold that the case cited by counsel not only is not opposed to the defendant's position but actually supports it.

Furthermore, your Honor, in determining at what point of time we should apply the local law, we cannot look at the date of the court order. As a matter of fact, the Government would concede for purposes of discussion that as [fol. 32] of the date in June, 1952, when the probate court entered an order for support, that the decedent's surviving spouse was then entitled to say $42,000.00. As a matter of

fact, for discussion purposes, we could concede that she was entitled to the entire $72,000.00. But our position is that in determining the nature of her interest, that is, as to whether it was vested or whether it was terminable, we have to look at the date of the decedent's death and not at the date of the court order. Now, in support of this, your Honor, and with the Court's indulgence, I would like to read an appropriate passage from the opinion of the Court of Appeals for the Ninth Circuit in the Cunha case bearing on this very point. The Court there says as follows:

> "The right to receive a widow's allowance must be characterized according to the attributes it possesses at the instant of the decedent's death. The Senate Report of 1948 states in this regard"—

And I should mention, your Honor, that the reason that the court here refers to the Senate Report of 1948 is that the law, the statutory section in the Internal Revenue Code of 1939 came into effect with the 1948 Revenue law; therefore, we can look to the Congressional statements as of that date. I go on with the statement:

> "The Senate Report of 1948 states in this regard that 'in determining whether an interest is a terminable [fol. 33] interest * * *, the situation must be viewed as at the date of the decedent's death.'

The court further said,

> "To identify the 'property' referred to in section 812(e)";

which is our Section,

> "as the 'assets actually paid to the widow out of the gross estate of the decedent, no more or no less,' as did the court in Quivey v. U. S."—

That is a case decided by the Federal Court for the District of Nebraska in 1959.

> —is to view the situation not as it existed 'as at the time of the decedent's death' but rather from a point

in time after the widow had been paid. The widow has only the right to apply for an allowance at the time of her husband's death, the right to an allowance itself not accruing until after a court order granting it."

Citing the Supreme Court decision in the Blair case.

"The right to receive payments terminates upon the death or remarriage of the widow and in any event upon completion of administration, and the right is personal to the widow and cannot be assigned or given away. * * * Such are the essential attributes of the right to an allowance in California, looked [fol. 34] at as of the time of the death of the surviving spouse's husband. Said attributes are not those one associates with the 'bundle of rights' ordinarily thought of as ownership."

To repeat, then, your Honor, under the law of California as interpreted by the Blair case and as applied in the Federal Tax case of Cunha, the interest which the surviving spouse received, whether it was $42,000 or $72,000, or any other sum, at any time after the decedent's death, was still a terminable interest, because you have to characterize this interest by viewing it as of the date of the decedent's death.

Now, there is one further argument made in counsel's brief filed with this Court and that is that the balance of thirty thousand dollars, that is the excess over the forty two thousand which the surviving spouse was entitled to as of the date of the court order, that that thirty thousand dollars conceivably could be deductible by viewing it as an amount to which the wife would be entitled under other provisions of the decedent's will.

Now, the Government would grant that if the surviving spouse were undeniably entitled to this thirty thousand dollars under the provisions of the decedent's will, that deduction should be allowed even though it might constitute [fol. 35] a terminable interest for purposes of Section 812(e). But, your Honor, I have here the original Federal Estate tax return filed by the Estate to which is attached a

certified copy of the Decedent's last will and testament. I propose to offer this in evidence as Defendant's Exhibit 1.

The Court: You may offer it at this time, and I will take the matter under submission.

Mr. Keir: Well, may I make a comment or two about this?

The Court: Yes.

Mr. Keir: And with the Court's permission, I would like to be able to have this withdrawn so I can substitute a photostatic copy.

The Court: All right.

Mr. Keir: Defendant's Exhibit 1.

The Court: It may be marked as an exhibit.

Mr. Keir: Yes.

The Court: Government's exhibit.

Mr. Keir: Your Honor, under the terms of the Decedent's last will and testament, the surviving spouse to whom these payments were paid was entitled to two basic interests; No. 1, she was entitled to receive the household furnishings of the personal type under item Third and she was also entitled to certain payments under a trust set up [fol. 36] under item Fourth.

It is the Government's contention that if this thirty thousand dollars is not allowable under Section 812(e), it could not possibly be allowed under any conceivable distribution pursuant to the decedent's will, because obviously it is not personal property like household furnishings, and even if it were paid under the trust provisions of item Fourth it would still be disqualified because the trust under item Fourth is a terminable interest.

Now, one last point, your Honor: In the Federal Estate tax return itself, Schedule M, which is entitled "Requests, etc., to Surviving Spouse (Marital Deduction)", there are three basic categories here of deductions, for the purposes of marital deductions. Item 1, in the amount of seventy one thousand plus relates to insurance on the decedent's life. Item 2, in the amount of eighty three thousand dollars plus relates to jointly held property; and item 3 is the deduction of $72,000.00 as support payments.

It is obvious that if the $72,000.00 is not deductible as support payments, they could not be deducted as jointly held property or as insurance.

Now, finally, your Honor, a comment on counsel's suggestion to the Court that this case could be submitted on a stipulation of facts; obviously it could, but, under Rule 56, [fol. 37] if there is no genuine controversy on any issues of fact, then, upon the filing of a motion under Rule 56, summary judgment may be granted.

It is our contention that there is no issue of fact. We concede, for all practical purposes, that the $72,000.00 was paid. We are placing in evidence the decedent's last will and testament and his Federal Estate Tax return. We are unaware of any other basic facts that must be submitted to the court in order to decide this case. We think that the Court can just as easily decide it under Rule 56.

Mr. Burks: May I be heard briefly, your Honor?

The Court: Yes, sir.

Mr. Burks: For the purpose of his motion, as I understand it, Mr. Keir is willing to concede that of this $72,000.00 that was paid to the decedent's widow, that $42,000.00 was paid after June 30, 1952 out of the corpus of the decedent's estate; is that right, Mr. Keir? You make that concession, is that correct?

Mr. Keir: That is right.

Mr. Burks: The first point that Mr. Keir made was that the situation had to be regarded as of the date of the decedent's death. Now, if that were true, your Honor, there couldn't be any family allowance payments which were deductible under the marital deduction provisions of the Federal Estate tax law.

[fol. 38] The fact is that in many states, as pointed out both in the Rudnick decision and in the Cunha case, family allowance payments are allowed for marital deduction purposes.

Now, it isn't known in that State any more than it is in California as at the date of the decedent's death whether or not there will be any family allowance. So that I think that any language in the Cunha decision of the Court of Appeals for the Ninth Circuit to that effect is at variance both with other decisions and with the rules of the Treasury Department itself.

The Senate Report to which Mr. Keir referred in effect said that the marital allowance was being eliminated as a

standard deduction but it would be allowed under the marital deduction provisions of the Estate tax laws; and any reference in the Senate Report to as of the date of death has an exception to it, either through Treasury rulings, through the law itself, or through these many decisions which have allowed family allowance payments under the marital deduction provisions of the Estate tax law. So, in that respect I think that Mr. Keir's basis for what he would like this Court to do is not well founded.

Mr. Keir hasn't responded to my suggestion that under the rule of the Estate of Lux, the situation in California is [fol. 39] the same as to this $42,000.00 which had accrued and to which the decedent's widow was entitled as of the time the order was made. Now, I am not speaking of the thirty thousand dollars which represented future payments. I really don't feel how this Court could do anything other than say that those payments don't qualify under the rule of Cunha, but I do say that under the rule of these other cases, the Treasury Department regulations and the Estate of Lux rule, that this was a sum to which the widow was entitled when the order was made and it is no different than a bequest under the deceased's will.

Now, if this issue is to be determined on a motion for summary judgment, I would like an opportunity to submit memorandum before any decision is reached, amplifying the arguments that I have made here today.

The Court: Well, I might give you permission to file that in written form, just what you have stated now.

Mr. Burks: I would like to, your Honor.

The Court: Do you want 20 days on that?

Mr. Burks: That will be fine, your Honor.

The Court: That will be 20 days for Mr. Burks. He wants to put in written form his opposition to your motion for summary judgment, within 20 days from now.

Mr. Keir: If your Honor please, will we have an opportunity of filing a memorandum in opposition to that?

[fol. 40] The Court: You want ten days to reply to it? In other words, there is no use for you to write a brief until you see what Mr. Burks is going to do.

Mr. Keir: Right.

The Court: I will give Mr. Burks 20 days and give you 10 days to reply.

Mr. Burks: Your Honor, may the plaintiff also have the opportunity to file affidavits, to the same effect as though they had been filed with the Court during this hearing?

The Court: Certainly.

Mr. Keir: Your Honor, there is one further technical point here which is not involved in this particular issue. There is a claimed deduction for attorneys' fees which we state could be substantiated by proof by counsel, and if the Court feels that it should render a summary judgment in connection with the principal issue, then the question of the attorneys' fees could be set down for hearing separately.

The Court: Well, you can put it in affidavit form.

Mr. Burks: I might suggest, your Honor, that as I understand Rule 56, if there is anything of that nature, that the motion should be denied because of the factual nature such as the amount of the attorneys' fees. Now, I don't think this matter should be decided on a motion for sum-
[fol. 41] mary judgment, and I think technically that that one fact that attorneys' fees have not been determined is reason enough in itself to deny the motion. If it were any other proceedings, I would not—

The Court: Well, I will consider your views on the matter.

Mr. Keir: Your Honor, may I make one further comment. I want to take issue with counsel that summary judgment cannot be granted upon one issue. I think subsection (d) of Rule 56 grants the court full authority for giving judgment on this issue and leaving this other issue of fact as to attorneys' fees open for further disposition either by affidavit or upon hearing as requested by the court.

The Court: Well, the matter will stand submitted.

Mr. Keir: Thank you.

[fol. 42] Reporter's Certificate to foregoing transcript (omitted in printing.)

[fol. 43] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 964-57-TC Civil.

[Title omitted]

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT—January 18, 1962

This cause having come before the court for hearing on defendant's motion, pursuant to Rule 56, Federal Rules of Civil Procedure, for summary judgment; notice of which motion was filed November 8, 1961; and the matter having been argued and submitted for decision on January 17, 1962;

And it now appearing to the court that there is no issue of material fact remaining to be tried and that defendant is entitled to judgment as a matter of law (F.R. Civ. P. Rule 56; Estate of Cunha v. Commissioner, 279 F.2d 292 (9 Cir. 1960), cert. den. 364 U.S. 942 (1961));

It Is Now Therefore Ordered that defendant's motion for summary judgment is hereby granted.

It Is Further Ordered that findings of fact, conclusions of law and summary judgment in favor of defendant be prepared by the attorney for defendant and lodged with [fol. 44] the Clerk of the Court, pursuant to Local Rule 7, within five days.

It Is Further Ordered that the Clerk shall this day serve copies of this order by United States mail upon the attorneys for the parties appearing in this cause.

Dated January 18, 1962.

Thurmond Clarke, United States District Judge.

[fol. 45] [File endorsement omitted]

IN THE UNITED STATES DISTRICCT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION
No. 964-57-TC Civil.

FRANCES S. PARKER (formerly FRANCES S. RICHARDS), Executrix of the Will of GEORGE A. RICHARDS, Deceased, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND SUMMARY JUDGMENT ENTERED—January 31, 1962

The above matter having come on for hearing before this Court on defendant's motion for summary judgment, based on the pleadings and admissions on file, and the Memoranda of the parties, this Court having duly considered the matter, now makes its findings of fact, conclusions of law and enters judgment as follows:

Findings of Fact

1. Jurisdiction of the complaint in said action is conferred upon this Court by Title 28, United States Code, Section 1346.

2. Plaintiff is the duly appointed, qualified and acting executrix of the Will of George A. Richards, Deceased. At all times mentioned herein she was and now is a resident of the County of Los Angeles, State of California, within the jurisdiction of this Court.

[fol. 46] 3. Petitioner, as executrix, paid to herself individually, for her support and maintenance, a sum amounting to $72,000.00. Said sum was paid pursuant to

order of the Superior Court of the State of California, in and for the County of Los Angeles.

4. Plaintiff, as executrix, filed a timely claim for refund of the taxes sought to be recovered by the complaint, on the ground that the said $72,000.00 was deductible under §812(e) of the Internal Revenue Code of 1939 and that attorneys' fees and expenses incurred in the prosecution of this action were deductible under §812(b).

Conclusions of Law

1. This Court has jurisdiction of the parties and subject matter of this action.

2. The payments by plaintiff, as executrix, to herself individually for her support and maintenance, pursuant to order of the Superior Court of the State of California, in and for the County of Los Angeles, constitute a terminable interest and are not deductible for federal estate tax purposes under the provisions of §812(e) of the Internal Revenue Code of 1939, as amended.

3. The plaintiff is entitled to recover nothing from the defendant with respect to the issue of the deductibility for federal estate tax purposes of the payments to plaintiff individually for her support and maintenance.

Summary Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law,

It Is Hereby Ordered, Adjudged and Decreed that on the issue of the deductibility for federal estate tax purposes of the payments to plaintiff individually for her support and maintenance, plaintiff recover nothing from defendant; [fol. 47] and that the Court retains jurisdiction of this action for the purpose of determining the amount of any deduction for federal estate tax purposes to which plaintiff

is entitled for attorneys' fees and expenses incurred in the prosecution of this action, upon proof thereof to the Court.

Dated: January 31, 1962.

Thurmond Clarke, United States District Judge.

[fol. 48] Certificate of service by mail (omitted in printing).

[fol. 49] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION
No. 964-57-TC Civil.

L. R. JACKSON and BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustees under the Will of G. A. Richards, Deceased; FRANCES S. CARTMELL (formerly Frances S. Richards and Frances S. Parker), Executrix of the Will of said decedent,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

NOTICE OF APPEAL—Filed March 29, 1962

Notice Is Hereby Given that L. R. Jackson and Bank of America National Trust and Savings Association, as Trustees under the Will of G. A. Richards, Deceased; Frances S. Cartmell (formerly Frances S. Richards and Frances S. Parker), Executrix of the Will of said decedent, plaintiffs above named, appeal to the United States Court of Appeals for the Ninth Circuit from the summary judgment entered in this action on January 31, 1962.

The names of the parties to this judgment and the names and addresses of their respective atorneys of record are: L. R. Jackson and Bank of America National Trust and Savings Association, as Trustees under the Will of G. A. [fol. 50] Richards, Deceased; Frances S. Cartmell (formerly Frances S. Richards and Frances S. Parker), Executrix of the Will of said decedent, plaintiffs herein, who are represented by Flint & MacKay, Paul Burks and John C. Argue, at 458 South Spring Street, Los Angeles 13, California; United States of America, defendant herein, who is represented by Francis C. Whelan, United States Attorney, Robert H. Wyshak, Assistant United States Attorney, Chief, Tax Division, Loyal E. Keir, Assistant United States Attorney, 808 Federal Building, Los Angeles 12, California.

Dated: March 27, 1962.

Flint & MacKay, Paul Burks, John C. Argue, By Paul Burks, Attorneys for Plaintiffs, 458 South Spring Street, Los Angeles 13, California.

[fol. 52] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 53]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18,128

L. R. JACKSON and BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustees under the Will of G. A. RICHARDS, Deceased; FRANCES S. CARTMELL (formerly Frances S. Richards and Frances S. Parker), Executrix of the Will of said decedent,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the Southern District of California, Central Division

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OPINION—May 15, 1963

Before: CHAMBERS, BARNES AND JERTBERG, Circuit Judges.

JERTBERG, Circuit Judge:

George A. Richards, a resident of the County of Los Angeles, State of California, died testate on May 27, 1951, leaving surviving him his widow, Frances S. Richards, and a daughter, Rosene Richards Moore. On June 19, 1951, the decedent's will was duly admitted to probate and his widow qualified as executrix of the last will of decedent.

The decedent by his will and the codicils thereto, after bequeathing to his wife personal property consisting of jewelry, automobiles, personal effects, household furniture, etc. and after making certain pecuniary bequests, left the residue of his estate to trustees in trust. The trustees were required to pay the income of the trust to his daughter for her life after the payment of specific income payments to his sisters and a sister-in-law. His wife was entitled under

the terms of the will to income of the trust after the death [fol. 54] of the daughter if she survived the daughter. It was further provided that upon the death of the survivor of his wife or daughter, the trust was to terminate excepting the retention of sufficient principal to fulfill the income bequests to his sisters and a sister-in-law if any of them survived the death of both his daughter and wife. The remainder, if his daughter survived his wife, was to pass to the issue of the daughter, but if she had no issue and did not exercise a power of appointment granted her, then to his heirs. In the event his wife survived the daughter, the remainder was to pass according to the provisions of her will, but if no provision was made therein, then to the issue of his daughter, and if the latter had no issue, then to his heirs.

On June 30, 1952, pursuant to Section 680 of the Probate Code of California, the Superior Court of the State of California, in and for the County of Los Angeles, ordered that the executrix be authorized and directed to pay to herself individually as the surviving spouse of the decedent the sum of $3,000.00 a month from the corpus of the decedent's estate for her support and maintenance beginning May 27, 1951 and continuing until further order of the court, but not exceeding a period of 24 months.

As of the date of the court order, June 30, 1952, $42,000.00 in family allowance was due and payable to the widow. Said sum and an additional sum of $30,000.00, or a total of $72,000.00, were in fact paid to the widow from the corpus of the estate.

On August 25, 1952, the executrix filed a Federal Estate Tax Return on behalf of the estate, and the tax shown thereon was paid. On said return the executrix claimed a deduction, under Section 812(e) of the Internal Revenue Code of 1939, as Amended (the Marital Deduction provisions), of said $72,000.00. The Internal Revenue Service, upon audit, disallowed said deduction. The executrix paid the additional tax, together with interest thereon, which resulted from the disallowance of said deduction. Following disallowance of a claim for refund, the executrix filed suit for refund of Federal Estate Tax in amount of $29,500.00,

plus interest, and for such additional amount by which the Federal Estate Tax due by reason of decedent's death might be reduced by the executrix's costs, expenses and attorney fees incurred in the prosecution of said claim for refund, and the court action to recover the same plus interest thereon.

[fol. 55] The district court granted the motion of the United States for a summary judgment in its favor, holding that the amount paid for family allowance was not deductible for Federal Estate Tax purposes under Section 812(e) of the Internal Revenue Code of 1939, as Amended.

On this appeal the taxpayer contends that the District Court erred in holding that the sum of $42,000.00 which was due and payable and paid on the date of the court order to the widow for her support and maintenance was not deductible under Section 812(e) of the 1939 Code, as Amended. In this connection it should be stated that the taxpayer makes no contention that the amount of $30,000.00 in family allowance which accrued and was paid to the widow after June 30, 1952, the date of the court order, is deductible. In fact, taxpayer in its brief states:

> "Only that portion of the allowance to the widow for the period from the date of the decedent's death to the date of the court order is involved. The question presented is whether the $42,000.00 total of family allowance payments which were due and payable on the date of the court order were vested and thus deductible under the Marital Deduction provisions of the Internal Revenue Code."

Section 812(e) of the Internal Revenue Code of 1939, as Amended, provides a marital deduction in computing the Federal Estate Tax.[1] The terminable interest provisions

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[1] § 812 (e). Bequests, etc., to surviving spouse.

"(1) Allowance of marital deduction.

"(A) In general. An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate." 53 Stat. 123,

of Section 812(e)(1)(B) of the 1939 Code were carried over into Section 2056(b) of the 1954 Code without any substantial change.

[fol. 56] There is no dispute between the parties that the right to widow's allowance is an interest in property passing from the decedent within the meaning of Section 812(e)(3) and that the terminable interest rule stated in Section 812(e)(1)(B) is applicable thereto.

There is likewise no dispute between the parties that by the terms of the decedent's will and codicils thereto, the interest in property passing which is under review meets the conditions set forth in Section 812(e)(1)(B)(i) and (ii). Hence, if such interest is a terminable interest within the meaning of Section 812(e) the amount of the value of such interest is not an allowable marital deduction. The critical question, therefore, before us is whether such interest will terminate or fail.

Before attempting to solve such question, we must determine the nature or character of a widow's right to receive an allowance from her deceased husband's estate. Such determination must be made in accordance with local law. See *Estate of Edward A. Cunha* v. *C.I.R.*, 279 F.2d 292 (9th Cir. 1960), *cert. denied* 364 U.S. 942 (1961); *United States* v. *First National Bank and Trust Company of Augusta*, 297 F.2d 312 (5th Cir. 1961); *United States* v. *Quivey*, 292 F.2d 252 (8th Cir. 1961); *United States Nat. Bank of Portland* v. *United States*, 188 F.Supp. 332 (1960);

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as amended by Revenue Act 1948, c. 168, § 361(a), 62 Stat. 110, 26 U.S.C.A. § 812(e).

"(B) Life estate or other terminable interest. Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

"(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

"(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse * * *"

Estate of William A. Landers, Sr. v. *C.I.R.*, 38 T.C. No. 83 (Sept. 13, 1962); *Estate of Margaret R. Gale*, 35 T.C. 215 (1960); *Estate of Proctor D. Rensenhouse*, 31 T.C. 818 (1959), on remand 252 F.2d 567 (6th Cir. 1958).

Under California law a widow is entitled to a reasonable allowance out of her deceased husband's estate for her maintenance during the progress of the settlement of the estate and which allowance, in the discretion of the court, may take effect from the date of death.[2] The right to a widow's allowance is purely statutory. *Hills* v. *Superior* [fol. 57] *Court*, 207 Cal. 266; *Estate of King*, 19 Cal.2d 354; *Estate of Blair*, 42 Cal.2d 728.

The right to a widow's allowance is not a vested right and nothing accrues before the order granting it. *Estate of Blair*, supra. The right to a family allowance is lost when the one for whom it is asked has lost the status upon which the right depends. *Estate of Blair*, supra. If a widow dies or remarries prior to securing an order for a widow's allowance, the right does not survive such death or remarriage. *Estate of Blair*, supra. The amount of widow's allowance which has accrued and is unpaid at the date of death of the widow is payable to her estate, but the right to future payments abates upon her death. *In re Lux*, 114 Cal. 73. The remarriage of a widow subsequent to an order for allowance abates her right to future payments. *Estate of Hamilton*, 66 Cal. 576. A widow's allowance ordered by the Probate Court is payable out of the assets of the estate, in preference to all other charges ex-

[2] Section 680 of the Probate Code of the State of California provides:

"The widow, widower, minor children, and adult children who have been declared incompetent by order of court are entitled to such reasonable allowance out of the estate as shall be necessary for their maintenance according to their circumstances, during the progress of the settlement of the estate, which, in case of an insolvent estate, must not continue longer than one year after granting letters. Such allowance must be paid in preference to all other charges except funeral charges, expenses of the last illness and expenses of administration, and may, in the discretion of the court or judge granting it, take effect from the death of the decedent."

cept funeral charges, expenses of last illness and expenses of administration. *Estate of King*, supra. *Estate of Cunha*, supra.

The June 30, 1952 order of the Probate Court decreed that the widow be paid the sum of $3,000.00 a month from the corpus of the decedent's estate for her support and maintenance, beginning May 27, 1951, and continuing until further order of the court but not exceeding a period of twenty-four months.

The taxpayer concedes that the right to receive an allowance accruing under the court order, after the date thereof, would terminate or fail upon the occurrence of an event or contingency, i.e. the death or remarriage of the widow. It is clear that should either of said events or contingencies occur, the interest in question would not in all events go to the widow or her estate.

[fol. 58] However, the taxpayer contends that the right to receive the allowance which accrued on the date of the court order was vested in the widow by such order since neither her death or remarriage would operate to divest her, or her estate, of the right to collect the same from the estate.

The United States takes issue with the taxpayer's position on alternate grounds. Its first position is that in determining whether an interest in property is a terminable interest and whether the conditions set forth in Section 812(e)(1)(B)(i) and (ii) are met, the situation must be viewed as of the date of decedent's death, and cites in support of such position *Estate of Cunha*, supra; *United States* v. *Quivey*, supra, other authorities and legislative history. The alternate position of the United States is that, even assuming the situation is to be viewed as of the date of the court award, the interest in property under review is still a terminable interest.

We are unable to embrace the appellant's contention for two reasons. In the first place, the right to receive a widow's allowance in the instant case was a right to receive the same in monthly installments during the progress of the settlement of the estate, which period by court order commenced on the date of decedent's death and extended for a period of twenty-four months. The right to receive the

allowance for the specified period is the interest in property passing from the decedent to his widow which is here under review. To uphold the appellant's contention would require us to hold that the interest in property passing may be fractionalized in the manner suggested by appellant into two interests—one vesting at the date of the court order, and the other interest not vesting—by the happenstance of the date of the court order in relation to the date of decedent's death. *Section 680, Probate Code,* supra, contemplates one order for family allowance during the progress of the settlement of the estate but limited in time by the court order. Under the section such order may be made at any time after the granting of letters of administration or letters testamentary. Under appellant's contention, if the court order in question had been made one month after date of death, only one month's allowance would vest and the monthly allowance for the remaining twenty-three months would not, and if the court order had been made at the end of the twenty-four months fixed in the court order, the [fol. 59] entire interest vests. No decision cited to us supports the bifurcation suggested by appellant.

In the second place it appears to us that to hold that the monthly installments which accrued on the date of the court order constituted a vesting of the interest in property passing would be contrary to the holding of this court in *Cunha,* supra, that "the term 'property' used in Section 812(e) as applied to a widow's allowance in California, refers to the assets of the estate and not to the right to receive the allowance." See pages 297-298.

Assuming, without deciding, that the terminable character of such interest must be determined at the date of the court order [in the instant case, made ten months before the expiration of the period] rather than at the date of decedent's death, we hold that the interest in property passing would terminate or fail upon the occurrence of an event or contingency, namely, the death or remarriage of the widow.

In this case the interest which passed from the decedent to his widow was in the corpus of the decedent's estate in which another interest had passed to decedent's daughter. If for any reason the widow's right to the marital allowance failed, it would not have gone in all events to her estate

but it would have served to augment the residuary estate in which the widow had only a limited and terminable interest. In such event a part of such property could be possessed and enjoyed by the daughter. See *Meyer* v. *United States*, 364 U.S. 410 (2nd Cir. 1960).

The judgment of the District Court is affirmed.

CHAMBERS, Circuit Judge, concurring:

I am unhappy with the above result. But Judge Jertberg's opinion convinces me that I must be unhappy with the statute which I think should be changed. And that, I suppose, is none of my business.

[File endorsement omitted]

[fol. 60]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18,128

L. R. JACKSON and BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, ET AL., Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

JUDGMENT—May 15, 1963

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered May 15, 1963.

[fol. 61] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 62]

SUPREME COURT OF THE UNITED STATES

No. 361—October Term, 1963

L. R. JACKSON, et al., Petitioners,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—October 28, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.